Supreme Court, U. S.
FILED
MAY 9 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1380

LOUIS ARADO, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY ISAKSON-INTERVENOR DEFENDANTS

WAYNE B. GIAMPIETRO
134 N. LaSalle Street
Suite 1100
Chicago, Illinois 60602
CEntral 6-0606

Attorney for Isakson-Intervenor Defendants

LAWRENCE A. POLTROCK
LIGTENBERG, DEJONG, POLTROCK & GIAMPIETRO
Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
QUESTIONS PRESENTED	2
APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	10

LIST OF AUTHORITIES CITED

Cases

Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958)	6, 7
Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971)	5
Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896)	7
McLaughlin v. Florida, 379 U.S. 184 (1974)	9

Constitutional Provisions and Statutes

Section 2, Article 4 of the Constitution of the United States	3, 5
Title 42, U.S.C. § 1981	3, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1380

LOUIS ARADO, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY ISAKSON-INTERVENOR DEFENDANTS

Isakson intervenor-defendants file this Response to the Petition for Writ of Certiorari filed by Louis Arado, et al., and support the request that a Writ of Certiorari be issued to review the decision in this case of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinions by the United States District Court for the Northern District of Illinois, and by the United States Court of Appeals for the Seventh Circuit are as set forth in the Petition for Writ of Certiorari filed herein.

QUESTIONS PRESENTED

Petitioners have briefed the following questions in their Petition for Writ of Certiorari:

1. Whether either Title VII of the Civil Rights Act of 1964 or the Constitution authorizes a federal district court to order an agency of state government to engage in racial quota hiring, absent proof of purposeful racial discrimination.

2. Whether Congress authorized the use of racial or ethnic quotas under Title VII of the Civil Rights Act of 1964 as a remedy for unlawful discrimination.

3. Whether the District Court's use of the guidelines of the Equal Employment Opportunity Commission establishes a rule that mere disproportion in the performance of black and white police officers taking a promotional examination is conclusively and irrebuttably presumptive of unlawful discrimination.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the Constitutional provisions and statutes set forth in the Petition for Writ of Certiorari, the following are pertinent:

Section 2, Article 4 of the Constitution of the United States:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Title 42, U.S.C. § 1981 states:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

As set forth in the Petition for Writ of Certiorari, this case consolidates a number of originally separate actions which challenge on both constitutional and statutory grounds, various employment practices of the Chicago Police Department. The suit brought by the United States in August, 1973, alleged patterns and practices which allegedly discriminated against blacks, hispanics, and women, in hiring, assignment, promotion, and discipline. The Petitioners in this matter intervened as party defendants on behalf of Chicago Police Department Officers who had passed an examination which would place them on a list for promotion to Sergeant. Roy Isakson, Fred Sansone, Robert Buckner, Larry Payne, Martin Leal, and George Flood were granted leave to intervene on behalf of those men who had passed a civil service examination which made them eligible to be hired as patrol officers, the entry level position in the Department of Police of the City of Chicago.

In its final decision on February 2, 1976, the District Court found that the City of Chicago had discriminated in promotion to the rank of Sergeant which is the basis of the Petition for Writ of Certiorari herein. In that same decision, the District Court found also that the City had discriminated in hiring of persons to the position of patrol officers. The District Court in this decision established a racial and ethnic quota for Sergeants' promotions, and also for hiring of patrol officers.

As set forth in the Petition for Writ of Certiorari, on January 11, 1977, the United States Court of Appeals for the Seventh Circuit affirmed this decision in most respects, upholding the imposition of racial and ethnic quotas as a remedy for the discrimination which had been found. At the same time, the Court of Appeals held that there was no evidence that the Chicago Police Department had engaged in purposeful discrimination.

REASONS FOR GRANTING THE WRIT

While the parties filing this response to the Petition for Writ of Certiorari are not directly attacking the ruling of the District Court, as affirmed by the Court of Appeals, setting quotas regarding hiring of patrol officers by their own petition for certiorari, since that portion of the decree directly relating to them has been vacated by the Court of Appeals, they do believe that this Court should grant the Petition for Writ of Certiorari herein to decide the very important issues which are presented in that petition.

As pointed out in the Petition for Writ of Certiorari herein, § 703(j) of Title VII forbids the use of preferential hiring policies to change the racial balance of an employer's work force. This was recognized by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 91 S.Ct. 849 (1971). Yet, the District Court sought to impose quotas for future hiring and promotion to change the racial balance of the work force of the Department of Police of the City of Chicago. This ruling flies directly in the face of the statutes sought to be enforced and the Constitution. This Court must authoritatively determine whether the Constitution means what it says or whether some classes of persons are to be more equal than others.

Since the founding of this country, it has been a philosophical goal constantly sought to be attained that "all men are created equal", as it is expressed in the Declaration of Independence. The history of our country has showed a steady attempt to secure this idea. Section 2, Article 4 of the Constitution decrees that "the citizens of each state shall be entitled to all privileges and immunities as citizens in the several states." The

Fourteenth Amendment likewise provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person, of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In furtherance of that mandate, Title 42 U.S.C. § 1981 was passed providing that all persons were to have the same right in every state to enforce contracts, to sue, to give evidence, and "to the full and equal benefit of all laws and proceedings for the security of persons and property."

This case presents the question whether that principle of equality is to be applied to all citizens of this country. This case squarely presents the issue of whether equal protection applies to the majority as well as the minority. Must the federal courts abide by the same rules which they would impose upon the states? The decision on this issue has ramifications far beyond this specific fact situation. The issue is whether the Fourteenth Amendment means what it says. As was said by this Court in *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958):

> "The Constitutional provisions [of the Fourteenth Amendment], therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning . . . Thus, the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the state taking the action . . . or whatever the guise in which it is taken . . .".

It is submitted that the only view which can be taken under our constitution is that which was put forth most eloquently by the first Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 41 L.Ed. 256 (1896):

> "But in view of the constitution, in the eye of the law there is in this country no superior, dominant, ruling class of citizen. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the Supreme Law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race."

Surely, the Constitution cannot mean that there can be no discrimination against minority groups but that there can be discrimination against the majority. Indeed, a holding that any hiring or promotion plan which is based upon race or ethnic background is certain to flounder as it will require the courts to engage in untold decisions as to who does and who does not belong to various groups. In addition, determinations will be required to be made as to what groups of what backgrounds are entitled to preferential treatment in varying situations.

This case presents a perfect example of the mischief inherent in such classifications. One of the classifications utilized by the District Court, and approved by the

Court of Appeals is that of "Spanish-surnamed males". The policy behind the selection of such classification is difficult to perceive. Such class includes no homogeneous, easily identifiable group, but encompasses a myriad number of persons with completely diverse backgrounds coming from Spain, Puerto Rico, and virtually all of the countries of South America. It includes those who may by accident of birth have acquired a Spanish surname, assuming that we may be able to identify such a classification with any reasonable degree of certainty.

The unreasonableness of such a classification is patent. It makes no difference under this classification whether the applicant's "Spanish" heritage is 100%, 50%, 25%, or less, so long as by accident of birth his surname happens to sound "Spanish". Similarly, with black persons. Who qualifies as a black person? The setting of such a quota assumes that black males are fungible, which, of course, is not true. Again, we must recognize that there are different degrees of "blackness". What of a person, one of whose parents was black, and one white? Into what category does he fall? Does his selection depend upon the darkness of his skin, or upon his cultural bent? Must we again be faced with a determination of what constitutes "Black"?

To state the problem is to make obvious the fact that quotas are not only ideologically and philosophically wrong, but also undefinable as a matter of practicality. Our society is a pluralistic one, made up of a great cultural and ethnic mix. Once one begins setting quotas, where does one stop? Must public employment, such as in a police department, reflect the racial and ethnic mix of the entire city? Why are certain ethnic and racial groups chosen for special consideration? What of those of

Polish ancestry, or American Indians, or Orientals? Would they not all be entitled to claim proportionate representation on the Chicago Police force?

To state the problem is to show that the approach taken by the courts below is wrong. This country was founded upon the proposition that it is the worth of the individual which is paramount. We are not a country of castes and discrete classes. We are a nation of individuals, each of whom is entitled to be judged upon his own merit, not his class or background. This court should take this case to emphasize that *no one*, be he black, white, yellow, or anything else, should be discriminated against because of that accident of birth. No one has the right to impose such a classification, be he employer, union, administrative agency, or judge.

This Court has declared that State action employing a racial classification is "constitutionally suspect . . . subject to the most rigid scrutiny . . . and in most circumstances irrelevant to any constitutionally acceptable legislative standard." *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1974). The same must apply to judicially imposed standards.

The Constitution and the entire philosophical history of our country cries out against discrimination of any kind, in favor of or against anyone. Discrimination on the basis of background is improper in every respect, be it privately or publicly imposed. Quota systems must not be sanctioned. This Court should squarely face that issue which is presented in this case.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WAYNE B. GIAMPIETRO
134 N. LaSalle Street
Suite 1100
Chicago, Illinois 60602
CEntral 6-0606

Attorney for Isakson-Intervenor Defendants

LAWRENCE A. POLTROCK
LIGTENBERG, DEJONG, POLTROCK & GIAMPIETRO
Of Counsel

see

7 6

1 3 9 0